

# CRIMINAL PROCEDURE AND SENTENCING

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## LEGISLATION

### CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT ACT 37 OF 2013

The Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 was gazetted on 27 January 2014 in GG 37268 GN 52. This Act provides for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis. All aspects with regard to the retrieval, storage and use of DNA samples and profiles are furthermore regulated. It also provides for the establishment and regulation of a National Forensic DNA Database of South Africa by way of and in terms of amended provisions in the South African Police Service Act 68 of 1995. The President, by proclamation in the *Government Gazette* (Proc 89 in GG 38376 of 30 December 2014), announced that the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 would come into operation on 31 January 2015.

### SUPERIOR COURTS ACT 10 OF 2013

The following notices with regard to the Superior Courts Act 10 of 2013 were published in GG 37390 of 28 February 2014:

- Government Notice 147 — Norms and standards for the performance of judicial functions

The norms and standards for the performance of judicial functions was issued by the Chief Justice in terms of section 8 of the Superior Courts Act 10 of 2013 read with section 165(6) of the Constitution of the Republic of South Africa, 1996 (the Constitution). The objectives of these norms and directives are to 'achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient and expeditious adjudication and resolution of all dis-

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putes through the courts, where applicable' (Preamble). The norms and directives are furthermore binding on all judicial officers and apply to all courts in the Republic of South Africa. The core values that underpin the norms and standards include: independence, equality and fairness, accessibility, transparency, responsiveness and diligence.

The norms and standards cover a wide range of judicial activities and provide, for example, for specific timeframes in which civil and criminal matters should be finalised in High Courts and magistrates' courts (para 5.2.5). It is furthermore recommended that judgments in both civil and criminal matters not be reserved without a fixed date for handing down (para 5.2.6), and that case flow management be directed to enhance service delivery and access to quality justice through the speedy finalisation of all matters (para 5.2.4).

- Government Notice 148 — Renaming of courts in terms of section 6 of the Act

The Superior Courts Act 10 of 2013 created a single High Court with various divisions in Grahamstown, Bhisho, Mthatha, Port Elizabeth, Bloemfontein, four in Pretoria, Johannesburg, Pietermaritzburg, Durban, Kimberley, Mahikeng and Cape Town.

- Government Notice 149 — Determination of sittings of the specific courts

A schedule indicating the terms and recesses of the courts up to 2020 was published in terms of section 8(6) of the Superior Courts Act 10 of 2013.

#### LEGAL AID SOUTH AFRICA ACT 39 OF 2014

The President assented to the Legal Aid South Africa Act 39 of 2014 in GG 38315 GN 1013 on 9 December 2014. This Act will come into operation on a date fixed by the President by proclamation in the *Gazette* and aims to 'ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution and to render or make legal aid and legal advice available'. To reach these goals and to perform all functions related thereto, an entity 'Legal Aid South Africa' is created in terms of the provisions of the Act.

Chapter 5 of the Act provides, *inter alia*, for legal aid by direction of courts in criminal matters and states. It provides that a court in criminal proceedings may only direct that a person be provided with legal representation at state expense if the court

has taken into account the personal circumstances of the accused, the nature and gravity of the charge against the accused, whether any other legal representation at state expense is available or has been provided, and any other factor which in the opinion of the court should also be taken into account (s 22(1)(a)(i)–(iv)).

Section 22(1)(b) furthermore requires that the matter must also have been referred to Legal Aid South Africa for evaluation and recommendation and that such a decision by a court in criminal proceedings is subject to section 22(3) of the Act which requires that the accused must have applied for legal representation at state expense, have been refused representation, have exhausted his/her internal right to appeal within the structures of Legal Aid South Africa (s 22(3)(a)), or have applied for legal representation at state expense and have received no response (s 22(3)(b)), or have been refused legal representation at state expense by Legal Aid South Africa and the court is of the opinion that there are particular circumstances that need to be brought to the attention of Legal Aid South Africa (s 22(3)(c)).

Note should also be taken of section 19 which deals with the protection of attorney-client privilege. In terms of section 19(1), a private legal practitioner who has been instructed by Legal Aid South Africa to represent an accused must, when requested to do so by Legal Aid South Africa, grant access to the information and documents contained in the file relating to the accused 'for the sole purpose of conducting a quality assessment of the work done by the legal practitioner'. Section 19(2) provides that the information and documents will remain privileged information against any other party 'as information between attorney and client, despite having been made available to Legal Aid South Africa'.

## CASE LAW

### CRIMINAL PROCEDURE

*Sections 68(6)(b) and 89(1) of the National Road Traffic Act 93 of 1996 and the Unlawful Seizure of a Motor Vehicle*

The vehicle of the applicant in *Ngqukumba v Minister of Safety and Security & others* 2014 (2) SACR 325 (CC) was seized by police after it was found that the chassis number of the vehicle

had been tampered with, the original engine number had been ground off, and the manufacturer's tag plate had been removed from another vehicle and placed on the applicant's vehicle (para [2]). While the Eastern Cape High Court, Mthatha, found the manner in which the police had seized the applicant's vehicle unlawful, it refused to return the vehicle to the applicant as sections 68(6)(b) and 89(1) of the National Road Traffic Act 93 of 1996 make it a criminal offence for any person to be in possession of a vehicle whose engine and chassis numbers had been tampered with (para [4]). The High Court consequently ordered that the vehicle be retained by the police until it had been re-registered in accordance with the National Road Traffic Act (para [4]). The Supreme Court of Appeal confirmed this decision and held that the police cannot lawfully release the vehicle, and a court order to this effect would be 'no different than ordering a person to be restored in the possession of his or her heroin or machine gun which he or she may not lawfully possess' (*Ngqukumba v Minister of Safety and Security & others* 2013 (2) SACR 381 (SCA), para [15]).

As the unlawfulness of the seizure of the applicant's vehicle was no longer in dispute, the Constitutional Court only had to consider whether the applicant's cause of action to have his vehicle returned to him could succeed given the fact that possession of the vehicle would constitute an offence in terms of sections 68(6)(b) and 89(1) of the National Road Traffic Act. In this regard Justice Madlanga writing for the majority of the Constitutional Court held that the provisions of the National Road Traffic Act do not oust the applicant's right to invoke the common-law *mandament van spolie* in having his property restored to him (paras [14] [18]). A spoliation order 'is meant to prevent the taking of possession otherwise than in accordance with the law' and all that the applicant had to prove was that he was in possession of the vehicle and that he had been deprived of his possession unlawfully (paras [10] [13]).

The Constitutional Court also found that the Supreme Court of Appeal proceeded from an erroneous premise in assuming that a tampered vehicle is no different from 'an article the possession of which could be unlawful under all circumstances' (para [15]). Section 68(6)(b) of the National Road Traffic Act provides that possession of a tampered vehicle would only be unlawful if the possession was without lawful cause (para [15]). Therefore, a harmonious reading of the common-law principle of the *manda-*

*ment van spolie* and the provisions of the National Road Traffic Act is not only possible, but also in line with section 39(2) of the Constitution in promoting the spirit, purport and objects of the Bill of Rights (para [18]). And such an harmonious reading should not be construed as thwarting effective policing, as section 22 of the Criminal Procedure Act 51 of 1977 provides for the seizure of objects without a warrant where the facts and circumstances of a particular case so require (para [19]).

With regard to this particular case, it was held that the applicant's possession of the vehicle 'pursuant to its return in terms of a court order would [therefore] only be unlawful if it were established that he did not have lawful cause to possess it . . . [and this] . . . conclusion can only be reached after an enquiry into the facts surrounding the applicant's possession' (para [21]). This enquiry can furthermore not be held together with the proceedings for a spoliation order as the aim and function for a spoliation order is clear, 'the despoiler must restore possession before all else' (para [21]). The respondents in this matter were consequently ordered to return the seized motor vehicle to the applicant's possession (para [23]).

#### INCARCERATION AS A GROUND FOR PREVENTING A CLAIM FOR DAMAGES FOR, *INTER ALIA*, WRONGFUL ARREST, MALICIOUS PROSECUTION AND WRONGFUL DETENTION

The plaintiffs in *Skom v Minister of Police & others, In Re: Singatha v Minister of Police & another* (285 & 284/2014) [2014] ZAECHC 6 (27 May 2014) were arrested on 11 June 2009, appeared before a magistrate on 15 June 2009, and remained in custody until they were discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977 on 5 December 2011. Both plaintiffs consequently claimed damages, including for wrongful arrest and malicious prosecution from the first defendant, and from both defendants, damages for wrongful detention (para [1]). In terms of the defendants' plea that the plaintiffs' claims had already prescribed, the plaintiffs submitted that their incarceration from 11 June 2009 to 5 December 2011 prevented them from instituting their claims (para [5]). The plaintiffs relied on section 13(1)(a) of the Prescription Act 68 of 1969 in this regard. This provides for the delay of a prescription period under certain circumstances, including that of 'superior force' (para [4]).

However, Justice Roberson for the Eastern Cape Local Division, Bhisho, did not agree that the plaintiffs' incarceration

constituted 'superior force' as envisaged in the Act. Both the plaintiffs had been legally represented throughout their trial and 'their mere incarceration did not prevent them from giving instructions to an attorney to institute proceedings on their behalf' (para [7]).

See *Lombo v African National Congress* 2002 (5) SA 668 (SCA) where incarceration was accepted as a form of 'superior force' interrupting the running of prescription in terms of section 13(1)(a) of the Act. However, the *Lombo* case can be distinguished from the present matter in that the claimant in that case was detained outside the borders of the Republic of South Africa.

### PROSECUTORIAL ETHICS

Neither the common law nor any statute — including the Criminal Procedure Act — provides for a prosecutorial code of conduct and ethics (*S v Masoka & another* (140039) [2014] ZACPEHC 54 (17 July 2014) para [8]). How prosecutors fulfil their functions in a criminal trial, their code of conduct, and the ethical norms in prosecuting a case are 'mostly unwritten rules having their origin in concepts of justice, fairness, morality and equity' (para [9]). In South Africa, many of these rules have been included in 'The Code of Conduct for members of the National Prosecuting Authority' promulgated under section 22(6) of the National Prosecuting Authority Act 32 of 1998 and published in *Government Gazette* 33907 of 29 December 2010 (para [9]).

#### *Interfering with witnesses for the defence*

In a special review in terms of section 24(c) of the Supreme Court Act 59 of 1959, Justice Alkema for the High Court Eastern Cape Local Division, Port Elizabeth, in *S v Masoka & another* (140039) [2014] ZACPEHC 54 (17 July 2014) emphasised the trite but fundamental rationale of a fair prosecution.

The purpose of a criminal trial is not to obtain a conviction at all costs. The duty of a prosecutor is to gather all relevant information and evidence, and then decide whether such evidence is sufficient to result in a conviction. If not, the decision must be made not to prosecute. If the evidence is sufficient, his/her duty is to place all such evidence before the court. In cases where the accused is represented by counsel or an attorney, the evidence which the prosecutor does not intend to place before the court must be made available to the accused's legal representative before the trial commences. In cases where an accused is

unrepresented, all such evidence, even evidence pointing to the innocence of the accused, must be placed before the Court (para [12]).

By the above remarks I do not intend to convey that the role of a prosecutor is both to prosecute the State case and also to defend the accused. A conviction must be sought and argued for firmly and without fear or favour. However, it must be done in an even-handed, open and honest manner always recognising an accused's right to a fair trial (para [13]; also see *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA)).

The two accused in the *Masoka* case were jointly prosecuted on a charge of robbery. Both pleaded not guilty and were represented by the same attorney instructed by the Legal Aid Board. Each of the two accused furthermore had an alibi attesting to his whereabouts on the night in question (para [2]). It transpired from the court record, however, that the prosecutor contacted and obtained a witness statement from the second accused's alibi witness without alerting the defence to this or making the statement available to the defence. It was only after the second accused had completed his evidence-in-chief that he was confronted by the prosecutor with the statement taken from his own alibi witness (para [5]).

This conduct by the prosecutor constituted a gross irregularity and compromised the right of the accused to a fair trial (para [17]). The prohibition on interference with the witness of the opposing party is not a rule of ethics applicable to prosecutors only, but it applies equally to private practitioners and investigators. In civil matters, where a legal representative interferes with or attempts to influence an opposing party witness, that legal representative may face an application to be struck from the roll of advocates or attorneys (para [16]). And, where an accused interferes with state witnesses he or she may be imprisoned pending trial and bail may be refused (para [14]). It was consequently ordered that the trials of the two accused be separated and that the entire proceedings against the second accused be set aside and his trial commence *de novo* before a different magistrate minus the witness statement the prosecution had solicited (paras [6] [19]).

*Failing to assist an unrepresented accused in securing the presence of a defence witness*

Justice Goosen for the Eastern Cape High Court, Grahamstown, in *Sodede v S* (A4656/2013, 2013000247) [2014] ZAECHGC

59 (24 July 2014) again emphasised the importance of presiding officers providing the necessary support and guidance to an unrepresented accused. In this case the accused was convicted of a breach of a protection order made in terms of the Domestic Violence Act 116 of 1998 and was sentenced to 24 months' imprisonment. It transpired from the court record, however, that the accused had wanted to call his grandmother as a witness, but that he had needed some assistance as she was sickly and not very mobile. But despite the accused articulating his wish to call his grandmother and the fact that she was sickly and immobile and the accused himself was unrepresented and in custody, neither the presiding officer in the court *a quo*, nor the prosecution was forthcoming with any advice or assistance (paras [4]–[7]).

Justice Goosen found that '[b]y adopting the attitude that no assistance would be rendered by the prosecution, or even by the court, the court effectively precluded the accused from calling a witness. That constitutes a gross irregularity which vitiated the fairness of the trial' (para [11]). The conviction was consequently set aside.

*The acceptance of the factual basis of a guilty plea is binding on the prosecution*

The accused in *Nkantini v S* (M78/14 [2014] ZAECHGHC 60 (24 July 2014)) pleaded guilty to and was convicted of stock theft (two sheep) and sentenced to eighteen months' imprisonment. However, on automatic review in terms of section 304 of the Criminal Procedure Act, it transpired that the trial magistrate relied during sentencing on a submission made by the prosecution that was contrary to that to which the accused had pleaded guilty in his section 112 statement (para [3]).

In *S v Mnisi* 2009 (2) SACR 227 (SCA), it was held that the acceptance of the factual basis for a plea of guilty is binding upon the prosecution and if the prosecution intends to present evidence to the contrary, that evidence must be led before conviction (para [6]). Section 112(3) can only be used to present evidence for the purpose of sentence and not to contradict the accused's version of events accepted in his or her guilty plea (para [6]).

The accused's sentence in the *Nkantini* case was consequently set aside and the matter remitted to the trial magistrate for afresh sentencing (para [8]).



*Conduct undermining the esteem of the office of the National Director of Public Prosecutions*

In *Zuma v Democratic Alliance & others* [2014] 4 All SA 35 (SCA), Justice Navsa for the Supreme Court of Appeal (with Justices Mpati, Brand and Tshiqi concurring) put an end to the protracted litigation between President Jacob Zuma, the office of the National Director of Public Prosecutions (NDPP), and the Democratic Alliance (DA). The DA had applied for an order reviewing, correcting, and setting aside the decision of the office of the NDPP to discontinue the prosecution of the appellant, and for a declaration that the decision was inconsistent with the Constitution. The DA also required that the record on which the impugned decision was based be delivered to them (para [3]).

In the first appeal before the Supreme Court of Appeal — *Democratic Alliance & others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) — it was held that a decision to discontinue a prosecution is an exercise of public power and must therefore comply with the Constitution (*Democratic Alliance & others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) para [27]). The court also ordered that the record on which the impugned decision was based, excluding those sections that would constitute a breach of confidentiality if made available, be handed over to the DA for consideration (*Democratic Alliance & others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) para [3.1.3]). This order had to be complied with within fourteen days of the date of the judgment (*Democratic Alliance & others v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA) para [4]).

This order was, however, not complied with and the DA approached the North Gauteng High Court, Pretoria, for an order, directing among other things that the record be produced as per the Supreme Court of Appeal order (para [16]). In response the Office of the Acting National Director of Public Prosecutions (ANDPP) was silent as regards the confidentiality of the tapes and transcripts, electing rather to lay its non-compliance with the Supreme Court of Appeal order at the door of the appellant's legal representatives, 'submitting that the present dispute was due to [the latter] not being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts' (para [18]). The ANDPP also submitted that the internal records — including the memoranda, minutes of meetings, and notes — all related to internal discussions and consultations leading up to the

decision to discontinue the prosecution and that these documents 'deal specifically with what was conveyed both in writing and orally in the representations submitted on behalf of the third respondent and on the basis of confidentiality. Those issues are inextricably linked with the recordings or transcripts. Thus all these fall within the ambit of the SCA order and are covered by the limitation for the production of the record' (para [19]). The North Gauteng High Court again directed the appellant in this present matter to comply with the Supreme Court of Appeal's order (para [24]).

Considering the history of this matter and the answering affidavit filed by the ANDPP, Justice Navsa for the Supreme Court of Appeal (with Justices Mpati, Brand and Tshiqi concurring) sharply criticised the office of the NDPP, describing their response to the current appeal as 'disingenuous', based on hearsay, endangering public confidence, and 'almost meaningless' (paras [26] [38]). It was held that the audio recordings did not constitute written representations and that the recordings came into existence long before the appellant made his representations (para [30]). It was also held that the NDPP had sought and obtained verification of the authenticity of the recordings from the National Intelligence Agency (NIA) and that the NIA had a copy of the recordings and had declassified the information. If, therefore, any privilege attached to the recordings, it could only be claimed by the NIA (para [30]). It was further accepted by the appellant's legal counsel that the 'gist of those recordings, namely that they contained a discussion involving the office of the NDPP indicating that the decision to prosecute Mr Zuma was politically inspired and constituted an abuse of power, had been made public in 2009 by Mr Mpshe' (the ANDPP at the time of the decision not to prosecute Mr Zuma) (para [30]).

With regard to the documents and information in possession of the NDPP, it was held that while the initial Supreme Court of Appeal order was not a blanket prohibition of disclosure, and excluded matters that the appellant could rightly consider confidential, an obligation to disclose existed in the absence of a specific claim of privilege (para [36]). The office of the NDPP 'must engender public confidence' and 'the maintenance of public confidence in the administration of justice required that it be, and is seen to be, even-handed' (para [38]). With regard to the NDPP's actions in this matter, it was said that

[I]t is to be decried that an important constitutional institution such as the office of the NDPP is loath to take an independent view about confidentiality, or otherwise, of documents and other materials within its possession, particularly in the face of an order of this court. Its lack of interest in being of assistance to either the high court or this court is baffling. It is equally lamentable that the office of the NDPP took no steps before the commencement of litigation in the present case to place the legal representatives of Mr Zuma on terms in a manner that would have ensured either a definite response by the latter or a decision by the NDPA on the release of the documents and material sought by the DA. This conduct is not worthy of the office of the NDPP. Such conduct undermines the esteem in which the office of the NDPP ought to be held by the citizenry of this country (para [41]).

In terms of an agreement between the parties, it was held that the original Supreme Court of Appeal order must be complied with within five days of the date of the order in the matter currently before the court, and that the internal documents in possession of the NDPP be handed over to an arbitrator, to which both parties agreed, to decide which portions thereof contain confidential written and oral representations made by the appellant to the NPA and should for that reason not be disclosed to the DA (para [42]).

### MALICIOUS PROSECUTION

Judge Zondi, writing for the majority of the Supreme Court of Appeal in *Minister of Safety and Security NO & another v Schubach* (437/13) [2014] ZASCA 216 (1 December 2014) affirmed the requirements for a successful claim of malicious prosecution as first formulated in *Minister of Justice and Constitutional Development & others v Moleko* [2008] 3 All SA 47 (SCA) para [8]

- (a) that the defendants set the law in motion (instigated or instituted the proceedings);
- (b) that the defendants acted without reasonable and probable cause;
- (c) that the defendants acted with malice (or *animo injuriandi*); and
- (d) that the prosecution has failed.

The respondent in the *Schubach* case was a member of the South African Police Service who had been arrested on information received from an informer about various firearms and ammunition which the respondent stored in a safe at offices under his control (para [2]). The respondent was consequently detained

and later appeared in court on charges relating to the unlawful possession of firearms and ammunition, despite his explanation that all the firearms and ammunition found were licensed and owned either by him, his wife, or third parties for whom he was holding them in safe custody (para [2]). Upon representations made to the DPP, the Senior Public Prosecutor was instructed not to pursue charges relating to the weapons and ammunition belonging to the respondent and his wife, but only to charge the respondent with regard to the weapons and ammunition belonging to the third parties, as well as some explosives found in the safe and which the respondent indicated belonged to the SAPS (paras [4] [5]). The DPP's instruction was, however, ignored and the respondent was ultimately prosecuted for the unlawful possession of all the firearms and ammunition found in the safe (para [5]). Upon conclusion of the trial the respondent was acquitted of all the charges (para [5]).

The respondent instituted a claim against the appellants for damages sustained as a result of his alleged unlawful arrest and malicious prosecution. At issue in this appeal, and with reference to the requirements for proving a malicious prosecution as set out above, was whether the determination of malice or a malicious intent on the part of the prosecution required that the prosecution decision be evaluated as a single intent and in its entirety, or be evaluated separately with regard to each of the charges brought against the respondent (para [12]). The DPP argued that 'the decision to prosecute constitutes a single intent and a single act, its reasonableness had to be evaluated in its entirety, and it was thus wrong to conduct such an evaluation separately since it is inconceivable that the prosecutor would have a malicious intent for one set of charges and not for the other; he either has malicious intent (*animo injuriandi*) or not' (para [12]).

Judge Zondi did not agree. He explained that the test to determine whether there has been malice on the part of the prosecution contains both a subjective and an objective element, in that there must be both an actual belief on the part of the prosecutor, and that belief must furthermore be reasonable under the circumstances (para [15]). The charges brought against the respondent must therefore be considered separately 'in determining the absence of reasonable and probable cause. Considerations pertaining to the one set of charges cannot be transposed onto the other. In other words, the fact that there was a reasonable and probable cause to prosecute on one set of

charges has no effect on the outcome of the enquiry in relation to the other set of charges. This is so, because the question whether reasonable grounds for the prosecution exist is answered only by reference to the facts of each case' (para [13]).

Judge Zondi also rejected the appellant's claim that section 42 of the National Prosecuting Authority Act 32 of 1998 creates legal immunity for prosecutors who act and exercise their powers in good faith. Section 42, it was held, only relates to *bona fide* mistakes and does not offer protection against civil claims where prosecutorial powers have been exercised maliciously (paras [19] [20]). It was consequently found that the decision to prosecute the respondent on certain of the charges he faced had indeed been malicious and that this entitled him to the damages claimed (para [20]).

Also see *Minister of Safety and Security v Tyokwana* (827/13) [2014] ZASCA 130 (23 September 2014) and *Minister of Police & another v Du Plessis* 2014 (1) SACR 217 (SCA) where it was held that prosecutors must always act with objectivity and in the public interest.

#### POWER OF THE JUDICIARY TO REVIEW PROSECUTORIAL DECISIONS

The applicant in *Freedom Under Law v National Director of Public Prosecutions & others* 2014 (1) SACR 111 (GNP) applied for the review and setting-aside of decisions by the NPA to withdraw criminal and disciplinary charges against the fifth respondent, Richard Mdluli, the Head of Crime Intelligence, and immediately to reinstate the charges concerned and bring the prosecution to finalisation (para [1]). The fifth respondent faced eighteen counts including murder, attempted murder, kidnapping, assault with the intent to do grievous bodily harm, defeating the ends of justice, fraud, corruption, theft, and money-laundering (para [27]).

In considering the structure of the NPA and the powers, duties and functions of the various office bearers within the NPA, Judge Murphy for the North Gauteng High Court Pretoria, referred to both section 24 of the National Prosecuting Authority Act 32 of 1998 and section 6 of the Criminal Procedure Act 51 of 1977. Directors of Public Prosecutions have the power, in terms of section 24 of the National Prosecuting Authority Act, to institute and conduct criminal proceedings, and section 20(3) of the Act also empowers DPPs to discontinue proceedings in terms of

section 20(1)(c) of the Act. Likewise, section 6 of the Criminal Procedure Act confers the power to withdraw charges or stop a prosecution upon DPPs and prosecutors. Where charges are withdrawn or a prosecution is stopped before an accused has entered a plea, the accused is not entitled to an acquittal and the charges may be reinstated at a future date (s 6(a)). On the other hand, the stopping of a prosecution after a plea has been entered, entitles the accused to an acquittal and to raise the plea of *autrefois acquit* should the prosecuting authority attempt to institute the same or substantially the same charges again (paras [110] [111]). In addition to these legislative provisions on the withdrawal charges and the stopping of prosecutions, the NDPP has also — in terms of section 21 of the National Prosecuting Authority Act 32 of 1998 — issued a policy manual containing prosecution policy and policy directives on how and when charges may be withdrawn and a prosecution stopped (paras [112]–[116]).

Whether such prosecutorial decisions to withdraw charges and stop prosecutions are reviewable in a court of law, was contested by the NDPP. Judge Murphy for the North Gauteng High Court, Pretoria, agreed that a false perception can easily arise ‘that the courts when exercising judicial review of prosecutorial decisions may trespass illegitimately into the executive domain’ (paras [117]–[119]). Judge Murphy subsequently set out in great detail the powers of the courts to review prosecutorial decisions to show that this power is indeed clearly defined and consistently exercised within the parameters set by the Constitution and Parliament (para [120]).

The judge first emphasised that the NPA has a duty to prosecute and a duty to continue a prosecution if a *prima facie* case exists and if there is no compelling reason for the charges to be withdrawn or for the prosecution to be stopped (para [121]). It is furthermore constitutionally guaranteed that the NPA will be independent and be able to exercise its functions without fear, favour or prejudice (s 179(4) of the Constitution). However, despite these considerations for judicial restraint, decisions not to prosecute or to discontinue a prosecution are administrative decisions and are indeed subject to review as to their legality and rationality by courts (paras [126] [131] [132]; also see *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) and *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA)). Legality

review in this context is 'concerned with the lawfulness of exercises of public power' and rationality as regards 'the relationship between means and ends and asks whether means employed are rationally related to the purpose for which the power is conferred' (para [126]). Rationality, furthermore, reflects on the processes and procedures followed and requires that such processes and procedures are, as regards the governing law and regulations, just, transparent and fair (para [127]).

With regard to counter-arguments by the respondents that in exercising its power to review prosecutorial decisions a court will *ipso facto* trespass on the executive domain, Judge Murphy held that

... the preponderance of all the modalities of interpretation, the text, historical intent, the ethos of our culture of justification, prudential and structural considerations, and doctrine, points inexorably to the conclusion that it was the intention of Parliament, pursuant to its obligation in section 33(3) of the Constitution to enact the Promotion of Administrative Justice Act 3 of 2000, (PAJA) that decisions not to prosecute or to discontinue prosecutions would be subject to judicial review in terms of PAJA (para [134]). ... [T]he law enacted by Parliament, in compliance with the obligation entrusted to it by the founders of our Constitution, imposes a duty on judges to review certain prosecutorial decisions. Far from trespassing into the executive domain, any judge in the South African constitutional order who declines deferentially to review a decision not to prosecute, in the mistaken belief that he or she is mandated by the doctrine of the separation of powers to do so, will ironically be acting in violation of the doctrine of the separation of powers (para [137]).

It was ultimately found that the orders sought by the applicant in this matter were appropriate, just and equitable. The various decisions by the first and third respondents to withdraw the charges against the fifth respondent were set aside, and the first and third respondents were ordered to reinstate forthwith the various charges levelled against the fifth respondent (paras [239]–[241]).

However, in *National Director of Public Prosecution & others v Freedom Under Law* 2014 (2) SACR 107 (SCA), Judge Brand, writing for the majority of the Supreme Court of Appeal, held that the exclusion of a decision to institute or to continue a prosecution from the ambit of the Promotion of Administrative Justice Act 33 of 2000 in section 1(ff) of the Act must also be understood to incorporate a decision not to prosecute or to discontinue a prosecution (para [27]). In referring to *Democratic Alliance &*

*others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA), he held that the same policy considerations that underlie prosecutorial decisions to institute prosecutions, also underlie prosecutorial decisions not to prosecute or to withdraw prosecutions (paras [25]–[27]). The decisions to prosecute or not to prosecute belong, therefore, to the same *genus* and, 'although on a purely textual interpretation the exclusion in s 1(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well' (para [27]).

With regard to the first appellant's submission that the decision not to prosecute was merely provisional and was made in terms of section 6(a) and not section 6(b) of the Criminal Procedure Act, it was held that a provisional decision not to prosecute is not immune from judicial review. Even despite the provisions of section 179(5)(d) of the Constitution, which require that such decisions are subject to review by the NDPP, the proposition that such 'provisional' decisions are, for this reason, not subject to challenge, had to be rejected based on the principles of legality and rationality (para [35]). It was also held that a decision to withdraw a criminal charge in terms of section 6(a) of the Criminal Procedure Act cannot be described as 'provisional' merely because it can be reinstated (para [43]).

Therefore, while the Supreme Court of Appeal agreed that decisions not to prosecute or to discontinue a prosecution can be subjected to judicial review, it held that such a review will be limited to the grounds of legality and rationality, and cannot be reviewed on the wider basis of the PAJA (para [27]). However, the Supreme Court of Appeal fully agreed with the High Court that the prosecutorial decisions taken in this matter be set aside and the prosecutions and disciplinary proceedings be reinstated (para [53]).

## JUDICIAL CONDUCT

For a judicial code of conduct and ethics the 'Bangalore Principles of Judicial Conduct 2002' were described by Judge Vahed in *Mkhize & others v S* (AR 182/2013) [2014] ZAKZPHC 31 (13 May 2014) as 'the lodestar of values for the conduct of judicial officers' (para [1]). The Bangalore Principles were developed by the Judicial Integrity Group with the active participation of Justice Langa and set out principles and guiding values for all persons exercising judicial power, however designated (para [1]). Value 6



of the Bangalore Principles deals with the competence and diligence of judicial officers and provides that

- 6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

In the *Mkhize* case, the way in which the magistrate conducted the proceedings and the lack of order and decorum on her part were sharply criticised. In dealing with the appeal Vahed J commented on the numerous unwarranted remarks by the trial magistrate, the unnecessary interventions on her part, and the fundamental misdirections that she gave (para [21]). Judge Vahed described the 'attitude and tone' of the magistrate as 'coming through quite plainly' and 'discourteous' (paras [25] [26]). The magistrate also ignored the request by the appellant's legal representative to present his closing argument on another day, and then, only after having heard the closing arguments of the second and third appellants' defence team, did she hear the closing argument of the prosecutor, followed by that of the first appellant's legal representative. Immediately on the conclusion of his address, the magistrate pronounced her verdict in which she found the appellants guilty (para [29]). This, according to Judge Vahed, lent considerable weight to the claim as to the magistrate's 'predisposition' against the appellants (para [30]).

At the sentencing proceedings the appellants were each sentenced to fifteen years' imprisonment on the charge of robbery with aggravating circumstances. To this, the magistrate added three years each because, she stated, 'my life was threatened by some members of your gangs, that is the information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case' (para [33]). This conduct by the magistrate is unacceptable, falls far short of the values outlined in the Bangalore Principles, and infringes on the appellants' right to a fair trial, warranting that their convictions and sentences be set aside (paras [34]–[37]).

## CHAPTER 13 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

*The correct procedure in terms of sections 77–79 of the Criminal Procedure Act 51 of 1977*

The accused in *S v Thanda* (140060, CA&R348/2014) [2014] ZAECGHC 100 (7 November 2014) was charged with and

convicted of murdering her husband. During the trial it emerged that she might be suffering from a mental illness as her legal representatives informed the court that she still believed her husband to be alive, indicated that she still saw and spoke to him regularly, and that she intended calling him as a witness in the proceedings (para [2]). It was consequently ordered that the case proceed under sections 77–79 of the Criminal Procedure Act and an order was made in terms of sections 77(1) and 78(2) of the Act that the accused be referred for psychological evaluation as prescribed by section 79 of the Act (para [3]). At the subsequent hearing, the presiding magistrate found, based on the psychiatric report, that the accused was not capable of understanding the proceedings so as to make a proper defence and proceeded to find the accused guilty of murder. The magistrate also ordered that the accused be detained pending the decision of a judge in Chambers in terms of section 47 of the Mental Health Care Act 17 of 2002 (para [4]).

The psychiatric report — compiled by two psychiatrists and a clinical psychologist — diagnosed the accused with psychotic disorder (unspecified), alcohol dependence, and traumatic brain injury and recommended that she be admitted to the Fort England Hospital as a state patient in terms of section 42 of the Mental Health Care Act 17 of 2002 (paras [8] [9]). This report was submitted to the parties in terms of section 77(2) of the Criminal Procedure Act and was accepted unopposed (paras [10] [11]). Yet, the trial magistrate never considered the composition of the psychiatric panel which had evaluated the accused. For example, no order was granted specifically for appointing a private psychiatrist, as is required by section 79(1)(b)(ii), or for a psychiatrist specifically for the accused, as is required in section 79(1)(b)(iii), or a clinical psychologist as contemplated in section 79(1)(b)(iv) of the Criminal Procedure Act (para [12]). It was also not clear whether the medical staff appointed to the panel were in the employ of the state, or how they had been identified and appointed to evaluate the accused (paras [13] [14]). And finally, it was not apparent from the court record how it had been determined that Fort England Hospital was the appropriate and designated hospital to which the accused should be admitted (para [16]).

The Deputy Director of Public Prosecutions provided more detailed information on the processes and procedures that had been followed in terms of the J138A Form (headed '*Lasbrief tot*

*oorplasing van 'n persoon wat aangehou word, na 'n inrigting, vir ondersoek kragtens die bepalings van hoofstuk 13 van die Strafproseswet 51 van 1977*) (paras [18]–[22]). However, it was also clear from this J138A Form that the provisions of section 79 of the Criminal Procedure Act regarding the appointment of the panel and the psychiatric assessment of the accused had not been followed and the psychiatric assessment of the accused was consequently found to be irregular, warranting a remittal to the regional court for the psychiatric assessment to be ordered afresh in compliance with the provisions of section 79 of the Act (paras [23] [24]).

A further irregularity in this case was that the accused was found to be incapable of understanding the proceedings and probably lacked criminal responsibility at the time of the alleged offence. Yet, she was still convicted of murder without any charges having been put to her and without requesting her to enter a plea (paras [25] [26]). Moreover, the evidence against the accused did not prove a *prima facie* case and there were many uncertainties as to how exactly the deceased had sustained the multiple and severe injuries, and whether the accused's version of events could reasonably possibly be true (paras [28]–[37]).

Also see *S v Luphuwana* 2014 (1) SACR 503 (GJ) for an exposition on the requirements of section 78 of the Criminal Procedure Act.

*Should an order in terms of section 78(6)(a)(ii)(aa) of the Criminal Procedure Act 51 of 1977 read with section 37 of the Mental Health Care Act 17 of 2002 be reviewed by a High Court?*

The accused in *Maluka v S* (A197/2013) [2014] ZAGPPHC 862 (31 October 2014) was acquitted on charges of assault, sexual assault and housebreaking with the intent to commit an offence unknown to the state. This transpired after the accused had been referred for observation in terms of section 78 of the Criminal Procedure Act and the psychiatric report had revealed that he suffered from schizophrenia and that despite his being able to understand and participate in the legal proceedings against him, was 'at the time of the alleged offence and as a consequence of his mental illness, unable to appreciate the wrongfulness of his deeds or act in accordance with any appreciation of wrongfulness' (para [6]). The magistrate consequently ordered that the accused be admitted to Weskoppies Hospital in terms of section 78(6)(a)(ii)(aa) of the Criminal Procedure Act as an involuntary

mental health care user as contemplated in section 37 of the Mental Health Act 17 of 2002 (para [7]). The matter was also referred for special review in view of the decision in *S v Ramokoka* 2006 (2) SACR 57 (W) where the court expressed the view that magistrates should, as a matter of good practice, refer their orders made in terms of section 77(6) to the High Court for review (para [8]). However, since courts of the same stature of this particular division had come to opposite conclusions (*S v Van Wyk* 2000 (1) SACR 79 (T) and *S v Wills* 1996 (2) SACR 105 (T)), the matter was referred to the Full Bench for a final decision on whether an order in terms of section 78(6)(a)(ii)(aa) of the Criminal Procedure Act read with section 37 of the Mental Health Care Act 17 of 2002 should be reviewed by a High Court (para [10]).

The automatic review procedure created by section 302 of the Criminal Procedure Act was established to protect accused persons sentenced to a term of imprisonment longer than three months. It is triggered if the accused was unrepresented when sentence was imposed; or, where the sentence exceeds three months' imprisonment, the judicial officer imposing the sentence has held the rank of magistrate for less than seven years; or, where the sentence exceeds six months' imprisonment, the judicial officer concerned has held the rank of magistrate for less than seven years (para [15]). The question in this case was, therefore, whether, given the aim of section 302 of the Criminal Procedure Act to provide an additional layer of protection when a person is deprived of his or her liberty, section 78(6)(ii)(aa) of the Act should not also be accompanied by similar guarantees and layers of protection (para [19]).

In *S v Zondi* 2012 (2) SACR 445 (KZP), the court disagreed with the *dictum* in *Ramokoka*, and while it conceded that the review powers of High Courts are extensive and include the power to review orders made in terms of section 77(6) of the Criminal Procedure Act, it also held that orders made in terms of section 78(6)(a)(ii)(aa) of the Act cannot be subject to an automatic review as a matter of good practice. Any prejudice that may result from such an order can rather be dealt with on appeal, or in terms of an application under the Mental Health Care Act 17 of 2002 for the discharge of the person involved (paras [25] [26]).

Judge Kollapen, writing for the majority of the North Gauteng High Court, Pretoria, agreed with the decision in the *Ramokoka* case and held that the potential of serious prejudice in the

deprivation of liberty of those who are mentally ill in terms of the said provisions of the Criminal Procedure Act, as well as the Mental Health Care Act 17 of 2002, warrants some form of automatic review. However, the judges also held that this is a matter best left for the executive and legislature to consider (para [39]). Until the legislature and the executive have adequately addressed this in terms of their policy-making and legislative functions, it was held that 'as a matter of good practice magistrates should refer orders made in terms of s 78(6)(ii)(aa) to the High Court for review' (para [40]).

#### SECTIONS 162 AND 164 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Section 162 of the Criminal Procedure Act provides that no person shall give testimony as a witness in criminal proceedings unless that person is under oath, administered by the appropriate judicial or court official. An important caveat to this provision is that if the presiding officer did not first establish that the witness understands the nature and importance of the oath, the testimony so given will be inadmissible (para [7]; *S v Matshivha* 2014 (1) SACR 29 (SCA)).

Exceptions to this general principle are provided for in sections 163 and 164 of the Act. Section 163 of the Criminal Procedure Act allows for unsworn testimony to be admissible in lieu of an affirmation that the witness speak the truth. Such an affirmation is typically used where the witness refuses to take the oath for religious reasons, or objects to taking the oath, or to taking the oath in the prescribed form, or does not consider the oath binding on his or her conscience. The affirmation to speak the truth is then taken at the direction of the judicial or other court official and has the same legal force as if the witness had indeed taken the oath. Section 164 of the Criminal Procedure Act further allows for unsworn or unaffirmed evidence to be admitted if the witness is unable to understand the nature and import of the oath or affirmation but has been admonished by the presiding judicial officer to speak the truth.

See *G v S* (CA&R 133/2012) [2014] ZAECGHC 112 (19 November 2014) for a case in which it was alleged that the magistrate had failed to determine whether the two complainants in a sexual offences matter were able to distinguish between truth and untruths, and whether they understood the importance of telling the truth. In this case it was found that the magistrate's question-

ing with regard to the complainants' level of schooling and comprehension was adequate to establish whether they were able to distinguish between truth and untruth and understood the importance of telling the truth (paras [5] [18]).

But in another case, *Rambuda v S* (156/14) [2014] ZASCA 146 (26 September 2014), the magistrate's questioning of the complainants was found to have been inadequate as it had failed to establish whether the child was able to distinguish between truth and untruth and 'had a proper appreciation of these abstract concepts "truth" and "untruth" and was thus a competent witness' (para [8]). In this case it was also held that cautioning a child to tell the truth was not sufficient to satisfy the requirements of section 164 of the Criminal Procedure Act as there is a duty on the presiding officer to admonish the child to speak the truth (para [8]).

#### APPLYING FOR LEAVE TO APPEAL AGAINST A CONVICTION AND/OR A SENTENCE

##### *The various provisions of the Criminal Procedure Act 51 of 1977*

In *Dexter v S* (P223/2013) [2014] ZAFSHC 77 (12 June 2014), Judge van Zyl set out the rules governing applications for leave to appeal against a conviction and/or sentence, as well as applications for leave to adduce further evidence. This discussion will only provide a synopsis of the relevant rules and will not deal with the merits and final judgment in this particular case.

Section 309(1) of the Criminal Procedure Act 51 of 1977 provides that a person convicted of an offence by any lower court may appeal the conviction and sentence, subject to leave to appeal being granted under section 309B or 309C of the Act (para [9]). Section 309B(1)(a) further provides that, subject to section 84 of the Child Justice Act 75 of 2008, an accused who wishes to note an appeal against a conviction or sentence must apply to that court for leave to appeal against his or her conviction, sentence or order (para [9]). Leave to appeal must, therefore, first be obtained from the trial court (para [10]). (Further remedies are available to an accused in terms of the Criminal Procedure Act where such leave has been applied for but has been refused.)

With regard to an application for leave to adduce further evidence, section 309B(5)(a) of the Criminal Procedure Act provides that the application must be brought together with an application for leave to appeal (para [12]; also see the Magis-

trates' Courts Rule 67). It is, therefore, evident that an application for leave to present further evidence should also be made to the trial court at the stage when the relevant application for leave to appeal is made (para [14]). Moreover, once an application for leave to appeal has been disposed of, the trial court will be unable to consider an application to lead further evidence (para [17]). Exceptions hereto can, however, be found in section 304(2)(b) of the Criminal Procedure Act, which allows for a court of appeal to hear evidence or to remit the case to the magistrate with the discretion to hear further evidence (s 304(2)(c)(v)), as well as in section 22(a) of the Supreme Court Act 59 of 1959 which empowers the Supreme Court of Appeal and the provincial or local division itself to hear evidence or to remit the matter to the court *a quo* for that purpose (para [19]; also see *S v Ross* 2013 (1) SACR 77 (WCC)). These exceptions apply when a High Court is hearing an application for leave to appeal in a matter which emanated from a lower court. In such circumstances the High Court is not the court of appeal (para [20]).

Finally, with regard to an application for leave to appeal against the refusal of the petition for leave to appeal against a sentence, it was held that the test to be applied by the Supreme Court of Appeal in such a matter is 'whether there are reasonable prospects of success in the envisaged appeal and if so, it will refer the matter back to the High Court to be heard by two judges as appeals emanating from lower courts are dealt with' (para [22]; also see *S v Kriel* 2012 (1) SACR 1 (SCA)). And, if such an application for leave is refused, the applicant can bring a direct petition to the President of the Supreme Court of Appeal (para [23]; also see *S v Khoasasa* 2003 (1) SACR 123 (SCA)).

*The previous Supreme Court Act 59 of 1959 versus the new Superior Courts Act 10 of 2013*

Under the previous provisions of the Supreme Court Act 59 of 1959, an appellant convicted in a regional court first applied for leave to appeal from the trial court, in terms of section 309B of the Criminal Procedure Act. If this application was refused, the appellant petitioned the Judge President of a Provincial Division in terms of section 309C of the Criminal Procedure Act. And, where such an application is refused by two judges of the Provincial Division, the appellant petitioned the Chief Justice of the Supreme Court of Appeal for leave to appeal. A refusal of such an application for leave to appeal by two judges of the

Provincial Division of a High Court was furthermore regarded as a 'judgment', 'order', or 'ruling' of that Provincial Division as intended in sections 20(1) and 21(1) of the Supreme Court Act 59 of 1959. Furthermore, the order of a court *a quo* in which leave to appeal has been refused, was likewise regarded as an order of that court as intended in section 20(3) of the Supreme Court Act 59 of 1959. The Supreme Court of Appeal in *S v Khoasasa* 2003 (1) SACR 123 (SCA) further held that the application directed at the Judge President of a Provincial Division for leave to appeal against a conviction or sentence in a lower court after such leave has been refused by the lower court, was not, in terms of section 309C of the Criminal Procedure Act 51 of 1977, the appeal against the conviction and/or sentence itself, but was rather an appeal against the magistrate's refusal of leave to appeal. In other words, it was directed at correcting what the appellant regarded as an incorrect decision in the lower court to refuse the leave to appeal. It therefore followed that the Supreme Court of Appeal could only hear an application for leave to appeal where the court *a quo* had refused such an application and the applicant had applied for leave to appeal with the Supreme Court of Appeal. (Also see *Matshona v S* [2008] ZASCA 58; *Hibbert v S* [2011] ZASCA 18; *AD v S* [2011] ZASCA 215; *Mkhize v S* [2012] ZASCA 74; *Thekiso v S* [2012] ZASCA 129; and *Matshona v S* [2008] ZASCA 58.)

The Supreme Court Act 59 of 1959 has been repealed by the Superior Courts Act 10 of 2013 which came into force on 23 August 2013, and sections 16 and 17 of this new Act regulate appeal procedures. 'Appeal' in terms of the new Act is defined as '... an appeal in a matter regulated in terms of the Criminal Procedure Act 51 of 1977. ... or in terms of any other criminal procedural law' (para [12]). And, since the Criminal Procedure Act contains no provisions regulating appeals from the decision of a full bench (2 judges) of a High Court, Vahed J held — in *Mthethandaba v S* 2014 (2) SACR 154 (KZP) — that the rationale of the *Khoasasa* case still applies: a petition in terms of section 309C of the Criminal Procedure Act, heard by two judges of a High Court, should be regarded as an appeal against an incorrect decision of a lower court, and any appeal against a refusal of that petition lies to the Supreme Court of Appeal only with the special leave of the Supreme Court of Appeal (para [14]).

This was also confirmed in *Van Wyk v S, Galela v S* [2014] 4 All SA 708 (SCA).



## THE LANGUAGE MEDIUM OF CRIMINAL PROCEEDINGS

At issue in *S v Dlamini* (DR224/14) [2014] ZAKZPHC 60 (9 December 2014) was whether any of the eleven official languages could be used at any stage in criminal proceedings at the instance of an accused or the discretion of the court, or whether one specific language of record should be prescribed for court proceedings (para [1]). The entire proceedings in this case were conducted in isiZulu at the direction of the magistrate who explained that most of the population in the rural area where the court was situated spoke Zulu; that all the parties involved in the case were Zulu speaking; and that the Constitution called for the recognition and equality of all eleven official languages (paras [4] [5]). Section 6(1) of the Magistrates' Court Act 32 of 1944 further provides that any of the official languages may be used at any stage of the proceedings in any court and the evidence shall also be recorded in the language so used (para [7]). And, section 35(3)(k) of the Constitution stipulates that 'every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language'.

However, Ndlovu J for the KwaZulu-Natal High Court, Pietermaritzburg, described the ideal of having every court operating in the language predominantly used in its area or region as 'elusive' and 'impracticable' (para [12]). He also reminded that the constitutional provision as set out in section 35(3)(k) (see above), does not confer a right on an accused to have the proceedings conducted in a language of his or her choice (para [10]; *Mthethwa v De Bruin NO & another* 1998 (3) SA BCLR 336 (N)). The language used in a court is rather at the behest of the presiding officer with due regard to an accused's right to a fair trial.

It was further held that the ideal of achieving fully multilingual courts in South Africa will require proper planning and logistical management, which is also recognised in the Constitution where it is said that 'any process aimed at realising and implementing the Constitutional imperative of promoting the use of indigenous languages in court proceedings should be embarked upon taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned' (para [13] quoting s 6(3)(a) of the Constitution; also see s 4 of the Use of

Official Languages Act 12 of 2012). It was consequently concluded that while it is within a magistrate's power to order that criminal proceedings be conducted in any of the official languages, such decisions are likely to have administrative and/or budgetary implications and cannot, at this stage, be decided on a whim, but should rather be resolved and determined by a competent authority at a future date (para [22]).

**AUDIO AND AUDIO-VISUAL BROADCASTING, AS WELL AS PERMISSION TO MAKE AND PUBLISH PHOTOGRAPHIC MATERIAL OF A CRIMINAL PROCEEDING**

In *Multichoice (Proprietary) Limited & others v National Prosecuting Authority & another, In Re; S v Pistorius, In Re; Media 24 Limited & others v Director of Public Prosecutions North Gauteng & others* 2014 (1) SACR 589 (GP), Judge Mlambo for the North Gauteng High Court, Pretoria, had to decide an application by the electronic, broadcast and print media of South Africa to broadcast the entire criminal trial in the matter of *State v Oscar Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014). This decision required that the rights of an accused person to a fair trial be weighed against the public's rights to have insight into criminal proceedings, for proceedings to be open and transparent to the public, and the rights of the media, particularly the right to freedom of expression (para [1]).

The media argued that the Pistorius trial had 'captured the attention and imagination of both the South African and international communities' and it was, therefore, in the public interest that they be broadcast to 'record and inform . . . communities of the trial proceedings as exhaustively as possible' (para [4]). It was also asserted that section 16 of the Constitution guarantees every person and entity freedom of expression, including the freedom of the press and other media to receive and disseminate information (para [6]).

Pistorius, on the other hand, argued that the live broadcast of his criminal trial would infringe on his right to a fair trial, as 'the mere knowledge of the presence of audio visual equipment, especially cameras, will inhibit him as an individual as well as his witnesses when they give evidence . . . [and] Counsel may also be inhibited in the questioning of witnesses and the presentation of his case' (para [12]). Pistorius also argued that should his trial be televised, it would enable witnesses yet to testify to fabricate

and adapt their evidence based on their knowledge of what other witnesses had already testified (para [12]).

This is not the first case in which a South African court has had to grapple with the issue of extending the media's coverage in South African courts. In *Dotcom Trading 121 Pty Limited t/a Live Africa Network News v King NO & others* 2000 (4) SA 973 (C), the audio broadcasting of the proceedings before the King Commission established to investigate match-fixing in South African cricket was allowed, as it was held that to 'prevent the radio broadcaster from recording the evidence is to deprive him of that advantage over the print media' (para [43] of the *Dotcom* case). In *SA Broadcasting Corporation Ltd v Thatcher & others* [2005] 4 All SA 353 (C), limited coverage of the Thatcher criminal trial was granted to the broadcast industry as the court balanced the right to privacy against the right to freedom of the press and freedom of expression and emphasised that courts have an inherent discretion to regulate its own proceedings (para [31] of the *Thatcher* case). However, in *South African Broadcasting Corporation Limited v Downer SC NO & others* [2007] 1 All SA 384 SCA, the Supreme Court of Appeal refused an application by the SABC to televise and sound-record the appeal proceedings. This decision was confirmed by the Constitutional Court in *South African Broadcasting Corporation Ltd v The National Director of Public Prosecutions & others* 2007 (1) SA 523 (CC).

What is evident from these cases is that in considering the issue of allowing greater media presence and coverage of criminal proceedings, a court must decide how best to accommodate parties' competing rights whilst exercising its discretion to regulate its own proceedings in a manner that is just and fair. This task was articulated by the Supreme Court of Appeal as follows in *Midi Television Pty Limited t/a E-TV & others v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 SCA para [9].

Where constitutional rights themselves have the potential to be mutually limiting — in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa — a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the

other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by section 36.

In considering the arguments by both Pistorius and the applicants in this present matter, Judge Mlambo emphasised the following (para [21]):

- Only a small segment of the community has access to Twitter and can stay abreast of what is happening in the courtroom via this means.
- The community at large is dependent on the media for news and to be informed of what is happening in the courtroom.
- The summarised versions of court proceedings that journalists usually produce have 'been correctly categorised as second hand, liable to be inaccurate as they also depend on the understanding and views of the reporter or journalist covering the proceedings' (para [21]).

Judge Mlambo consequently held that arguments which seek to entrench the workings of the justice system away from the public domain cannot be supported, especially not in light of sections 34 and 35(3)(c) of the Constitution which requires that legal proceedings, including criminal proceedings, be accountable, transparent and open to the public (para [23]). It was consequently ordered that audio coverage of the entire criminal trial be allowed, but that audio-visual (television) and still photography of the accused and the witnesses not be allowed as this has the potential to deprive the accused (Pistorius) of a fair trial in that he and the witnesses may be influenced by this in giving their testimony (paras [25] [26]).

#### APPOINTMENT OF ASSESSORS AND SECTION 93*ter*(1)(a) OF THE MAGISTRATES' COURTS ACT 32 OF 1944

The matter of *S v Dladla* (A583/14) [2014] ZAGPPHC 927 (14 August 2014) was referred for review in terms of section 304A of the Criminal Procedure Act after a point *in limine* had been raised that the accused in this matter had not been informed, before she pleaded, that she could opt for assessors to be included in the constitution of the court (para [4]). The accused was charged with murder and attempted murder, and section 93*ter*(1)(a) of the Magistrates' Courts Act 32 of 1944 provides for the appointment of two assessors before evidence has been led and if the judicial officer deems it expedient for the administration

of justice. Section 93ter(1)(b) furthermore provides for the appointment of assessors when a court is considering a community-based punishment, or where an accused is charged with murder in any regional court. In the latter instance the language of the provision is mandatory and states that the judicial officer in such a case shall be assisted by two assessors unless the accused requests that the trial proceed without assessors, whereupon it falls within the judicial officer's discretion to appoint one or two assessors to assist him.

Failure to appoint assessors in terms of section 93ter(1)(a) was considered in *S v Naicker* 2008 (2) SACR 54 (N) where Justice Holmes came to the conclusion that it is not a fatal irregularity that would render the proceedings a failure of justice *per se* (para [9]). In *S v Du Plessis* 2012 (2) SACR 247 (GSJ), however, it was held that failure to comply with section 93ter(1)(a) results in an irregularity *per se* which cannot be waived or condoned by the accused or his or her legal representative, and that a trial court has no discretion to do with or without assessors in a murder trial, unless the accused has specifically relieved the court of this duty to appoint assessors (para [10]).

Maumela J for the North Gauteng High Court, Pretoria, confirmed that irregularities in criminal proceedings can be reviewed under section 304 of the Criminal Procedure Act, even in instances where a conviction has not been made, and especially in the case of non-compliance with section 93ter (para [16]; also see *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA)). And with regard to the differing decisions in the cases of *Naicker* and *Du Plessis* it was held that lower courts such as magistrates' courts are bound by decisions of any division of a High Court and the *stare decisis* doctrine therefore requires compliance with the decision in *S v Du Plessis* 2012 (2) SACR 247 (GSJ). The present case was consequently remitted back to the regional court for the proceedings to start afresh before a different magistrate (para [24]).

#### SECTION 7(1)(A) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977 AND THE INABILITY OF JURISTIC PERSONS TO INSTITUTE PRIVATE PROSECUTIONS

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* (29677/2013) [2014] ZAGPPHC 763 (8 October 2014), the applicant sought an order declaring section 7(1)(a) of the Criminal

Procedure Act unconstitutional insofar as it does not allow for juristic persons to institute private prosecutions (para [1]). The applicant, a statutory body working for the prevention of the ill-treatment of animals, indicated that its inability to use this provision in the Criminal Procedure Act to initiate private prosecutions where the state has declined to do so, was frustrating its efforts to perform its statutory duties (para [3]). The applicant also argued that there was no apparent rational basis for treating juristic persons differently from natural persons in this regard (para [4]).

However, Judge Fourie for the North Gauteng High Court, Pretoria, did not agree. He rather emphasised the importance of having a single National Prosecuting Authority tasked with, and empowered to institute criminal proceedings on behalf of, the state and to carry out any necessary functions incidental thereto (para [12]). The exception allowed in this regard under sections 7 and 8 of the Criminal Procedure Act 51 of 1977 for natural persons and public bodies to institute private prosecutions under certain circumstances and if specific conditions are met, were furthermore found to be justifiably limited to exclude all persons and other entities who do not have a personal interest linked to some injury suffered, from (not) instituting a prosecution (para [26]). This limitation is important, it was held, 'to ensure proper statutory control, to achieve criminal justice and to comply with the constitutional imperative as far as a single National Prosecuting Authority is concerned' (para [27]).

The judge also indicated that section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1963 should be amended specifically to confer the right of a public prosecution upon the applicant, as is envisaged and provided for in section 8 of the Criminal Procedure Act with regard to private prosecutions by public bodies.

#### PURPOSE OF A SPECIAL ENTRY IN TERMS OF SECTION 317 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

In *Makumbane & others v S* (46/2013) [2014] ZASCA 116 (18 September 2014), Justice Wallis for the majority of the Supreme Court of Appeal warned that section 317 of the Criminal Procedure Act cannot be used to 'enable the applicants to reopen the case in order to give the evidence that they elected not to give at the trial' (para [7]). A special entry in terms of section 317 of the Act can only be made by the trial judge, and while such

a special entry may require evidence to be led of the irregularity insofar as it does not appear from the court record, it cannot, for example, be used to overcome failure to testify at the trial.

STATE *DOMINUS LITIS* IN ELECTING CHARGES TO BE PREFERRED  
AGAINST THE ACCUSED

The state in *S v Sehoole* (730/13 [2014] ZASCA 155 (29 September 2014)) appealed against a decision of the South Gauteng High Court, Johannesburg, to set aside the respondent's conviction on charges relating to sections 3 and 90 of the Firearms Control Act 60 of 2000. In setting aside the respondent's conviction and sentence, the court held that a person found in unlawful possession of a firearm of which the serial number had been filed away can only be charged with having contravened section 4(1)(f)(iv) of the Firearms Control Act 60 of 2000 and not section 3 of the Act (para [2]). An acquittal was consequently warranted, according to the South Gauteng High Court, if an accused had been charged under the incorrect section of an Act (para [5]).

Judge Mbha, writing for the majority of the Supreme Court of Appeal, did not agree and emphasised that the state remains *dominus litis* with regard to the prosecution and all pre-trial procedures, including the decisions whether to prosecute, on what charges to prosecute, in which court or forum, and when to withdraw charges (para [10]). It is also within the state's discretion to charge a person with a less serious offence (para [10] and see *S v Khalema and five similar cases* 2008 (1) SACR 165 (C)). Courts are generally not allowed to interfere with this prosecutorial discretion unless there are truly exceptional circumstances to warrant such interference (para [12]).

With regard to the provisions of sections 3 and 4 of the Firearms Control Act 60 of 2000, it was held that section 3 contains a general prohibition against the unlawful possession of a firearm, while section 4 deals with more specific cases of unlawful possession, for example where the serial number of a firearm has been removed (para [8]). Section 4 also attracts a harsher penalty of up to 25 years' imprisonment compared to the maximum penalty of fifteen years for a conviction of having contravened section 3 of the Act (para [8]).

The matter was consequently remitted to the South Gauteng High Court, Johannesburg, to hear the respondent's appeal *de novo*.

Also see *S v Swartz* 2014 (1) SACR 461 (NCK) where it was

held that in terms of a correction of a plea of guilty as provided for in section 113 of the Criminal Procedure Act, and where the judicial officer does not accept a plea of guilty on an alternative charge and orders the trial to proceed, that such a trial may proceed on the original charges and not on the alternative charges to which the accused had pleaded guilty, unless the prosecutor indicates otherwise (paras [40] [41]).

See, too, *S v Ncoko* 2014 (1) SACR 607 (ECG) and *S v Mhlambiso & another* 2014 (1) SACR 610 (ECG), where it was held that new charges may not be added to a charge sheet after evidence had been led. Section 81(1) of the Criminal Procedure Act merely provides for the joining of further charges to the original charge in the same proceedings against an accused after the accused has pleaded but before evidence has been led as to the original charge (para [7]). In the *Mhlambisa* case, it was held that 'there is no provision in the Criminal Procedure Act 51 of 1977 which permits the joining of further charges in the same proceedings against an accused after evidence had already been adduced at the trial' (paras [5] [6]). A new charge can only be added to the charge sheet before the commencement of evidence (para [7]).

#### THE COURT'S POWER TO SUBPOENA A WITNESS IN TERMS OF SECTION 186 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Judges Bosielo and Mathopo in a minority judgment for the Supreme Court of Appeal in *Ngobeni v S* (741/13) [2014] ZASCA 59 (2 May 2014) emphasised the importance of the court's power to subpoena a witness in terms of section 186 of the Criminal Procedure Act, and for justices to be proactive without compromising their impartiality, and to 'call for the relevant evidence, particularly where they are of the view that such a course is necessary to ensure a just outcome' (para [36]).

The appellant in this case was convicted of attempted murder and sentenced to four years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. The circumstances giving rise to this conviction occurred after a road rage incident between the appellant and the complainant in which the appellant averred that he had fired a shot in self-defence and did not realise that he had shot someone. The complainant, on the other hand, alleged that the appellant had shot at him directly and intentionally (para [3]).

The contradictions between the versions offered by the com-



plainant and the appellant and their respective witnesses were further exacerbated by an inconclusive medical report (J88). While the medical practitioner indicated that the complainant had been shot from behind, question marks under the rubric 'clinical findings' — which is meant to set out the findings with regard to the entry and exit wounds — shed doubt on whether the medical practitioner was indeed able to distinguish conclusively which of the two wounds was the entry wound and which the exit wound (para [3]). This was important as a rear entry wound would support the complainant's version of events, while a frontal entry wound would support the appellant's version that he had acted in self-defence.

While Judge Shongwe, writing for the majority, agreed that the trial court should have called the medical practitioner to testify at the trial and explain the question marks, it was also found that the failure to call the medical practitioner was not fatal to this case as direct and corroborated evidence supported the complainant's version of events (para [6]). Delivering a minority judgment, Judges Bosielo and Mathopo disagreed and held that it was clear that the regional magistrate had relied on the medical report in rejecting the appellant's defence and that this medical report was not conclusive, as the question marks made by the medical practitioner indicated that he was in doubt about certain aspects of the bullet wounds (paras [32] [33]).

Faced with such inconsistency on an issue crucial to the outcome of the case, the magistrate should have called the medical practitioner to testify and clarify the uncertainty in terms of section 186 of the Criminal Procedure Act (para [34]). Judges Bosielo and Mathopo emphasised that there is an inquisitorial element to criminal proceedings and that this is important to avert the possibility of injustice 'which might occur should a court remain supine in the face of a need to be proactive to obtain the necessary evidence' (para [38]). In this case, the regional magistrate was said to have erred in accepting the medical report without any further enquiry (para [39]).

## SENTENCING

### CONSTITUTIONAL VALIDITY OF SECTION 50(2)(A) OF THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 requires of a court to

order that the particulars of a person convicted of a sexual offence against a child or mentally disabled person be included in the National Register for Sex Offenders. The matter of *J v National Director of Public Prosecutions & another* 2014 (2) SACR 1 (CC) raised the question, however, whether the rights of a child offender are duly recognised and protected in terms of this provision. This is a particularly pertinent question given the far-reaching consequences of having one's particulars included in the National Register for Sex Offenders and the fact that courts have no discretion in this regard (paras [41] [42]).

In addition to the general stigma that attaches to having one's name included in the National Register for Sex Offenders, the following adverse consequences and limitations are specifically set out in the Sexual Offences Act: section 41(1) provides, for example, that a person whose details have been entered in the Register may not be employed to work with children under any circumstances; he or she may also not gain access to a child or places where children are present or congregate (s 41(1)(a) and (b)). Such a person may also not hold a position related to his or her employment or participate in practices for commercial gain, which place him or her in any position of authority, supervision, or care of a child, or become a foster parent, kinship caregiver, temporary safe caregiver, or adoptive parent of a child (s 41(1)(b) and (d)). Furthermore, a person whose details have been entered onto the Register may not be granted a licence or be given approval to manage or operate any entity, business or trade that relates to supervision over, or care of children or places where children are present or congregate (s 41(1)(c)). Likewise, section 40 of the Sexual Offences Act places corresponding limitations on the rights of employers and licensing authorities to grant persons whose details have been entered in the Register any access or rights or privileges as described above.

Two further provisions of the Sexual Offences Act that also relate to the mandatory inclusion of this specific category of sex offenders' details on the National Register, and the concomitant adverse consequences, is section 51(2) which provides that persons sentenced to a period of imprisonment of more than eighteen months, or who have two or more convictions for a sexual offence against a child or mentally disabled person, may never have their details removed from the Register. Section 51(1)(a)–(b) provides for the removal of a person's details from the Register, but only under limited circumstances and in terms of

the provisions of the Act. An offender is further obliged to disclose any convictions for sexual offences against children or persons with mental disabilities to an employer, licensing authority or childcare authority, even if their details are no longer included in the Register. Failure to do so may result in a criminal sanction (ss 46, 47(2) and 48(2)). These limitations are exacerbated when dealing with a child sex offender who committed the sexual offences while still under the age of eighteen, but will experience the adverse consequences of having his or her name included in the Register for the remainder of his or her life (paras [43] [44]).

However, while these limitations on the rights of convicted sexual offenders guilty of sexual offences against children or mentally disabled persons are far-reaching, the legitimate constitutional aim of the Sexual Offences Act in general, and the strict and mandatory provisions with regard to the National Register for Sex Offenders in particular, can also not be ignored. The overarching aim of the Sexual Offences Act is to protect victims of sexual offences, and particularly child or mentally impaired victims. The mandatory inclusion of the particulars of sexual offenders who have committed certain sexual offences against a child or mentally impaired person in the Register is, therefore, to protect children and persons with mental disabilities from coming into contact with sex offenders. The Register aims to achieve this by serving as an information database for relevant employers, licensing authorities, and childcare authorities (para [20]). Seen from this perspective, the limitation on a sexual offender's rights in terms of section 50(2) of the Act is reasonable and justifiable in an open and democratic society (para [7]).

In reviewing these limitations placed on the rights of sexual offenders, the adverse consequences that flow from having one's name and details entered onto the National Register for Sex Offenders, as well as the purpose and scope of the relevant provisions of the Sexual Offences Act, the Constitutional Court agreed with the finding of the Western Cape High Court, Cape Town, that the mandatory inclusion of the names and details in the National Register for Sex Offenders, of minor sex offenders who had committed sexual offences against other minors or mentally disabled persons, fails to adequately take into consideration the best interest of child sexual offenders (paras [46]–[51]). And, the limitation of the rights of child offenders in terms of section 50(2)(a) is, therefore, not justified in an open and democratic society (para [51]).

In reaching this decision the Constitutional Court emphasised that section 28(2) of the Constitution underlines the paramountcy of the best-interest-of-the-child principle and that the ambit of this constitutional provision is 'undoubtedly wide' (para [35]). The best-interest principle, read together with the provisions of the Child Justice Act 75 of 2008, are furthermore reflective of the individualised approach to child justice in South African jurisprudence and affirm the developmental nature of childhood and the moral malleability and prospect for reform of child offenders (paras [36] [38]). Justice Skweyiya, writing for the majority of the Constitutional Court, also highlighted the fact that in terms of section 50(2)(a) of the Sexual Offences Act, child offenders are not afforded the opportunity to make representations to the court before their details are included in the Register, while the guiding principles of the Child Justice Act 75 of 2008 require that 'every child should, as far as possible, be given an opportunity to participate in any proceedings . . . where decisions affecting him or her might be taken' (s 3(c) of the Child Justice Act 75 of 2008; para [40]).

The Constitutional Court consequently confirmed the order of constitutional invalidity handed down by the Western Cape High Court, Cape Town, declaring section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 to be invalid insofar as it unjustifiably limits the right of child sex offenders to have their best interest taken into account before the inclusion of their names in the National Register for Sexual Offences (*Johannes v S* 2013 (2) SACR 599 (WCC)). The Constitutional Court also suspended the declaration of invalidity for a period of fifteen months in order to allow Parliament to correct the defect in the legislation, and directed that the respondents provide the Registrar of the Court with a detailed report on the persons whose names had been included in the National Register for Sexual Offenders under section 50(2)(a) of the Act, and who were younger than eighteen years of age when they committed the offence which resulted in their inclusion (paras [52]–[57]).

#### SECTION 76(4) (d) AND (e) OF THE CHILD JUSTICE ACT 75 OF 2008 AND A COURT'S JURISDICTION TO IMPOSE AN ALTERNATIVE SENTENCE

The resident magistrate at Nerina One Stop Justice Centre in Port Elizabeth, Mr Goosen, was presiding over an automatic review of *S v Goliath* 2014 (2) SACR 290 (ECG) in terms of section

85(1)(a) of the Child Justice Act 75 of 2008, when he became concerned about what was happening at a juvenile facility near Bhisho (para [3]). An unannounced visit to the facility confirmed that the facility was wholly dysfunctional to the extent that the resident magistrate filed an urgent application citing, *inter alia*, the MEC for Basic Education in the Eastern Cape as respondent. The application ultimately resulted in the closing of the Bhisho juvenile facility (paras [5] [6]).

At question in the present matter was the placement of the children who had been sentenced to the Bhisho facility, and particularly the plight of the accused whose case was sent on special review citing the closure of the Bhisho reform school. The trial magistrate indicated that he was *functus officio* as the High Court had not set aside the accused's sentence and the magistrate was therefore — in his opinion and until the accused's sentence had been set aside — unable to re-sentence the accused (paras [11]–[13]).

In *S v Z and 23 similar cases* 2004 (1) SACR 400 (E), it was held that a court has the inherent power to review a sentence imposed by a regional magistrate where juvenile offenders sentenced to reform school had, 'by reason of administrative difficulties, been detained elsewhere for unreasonably long periods before their sentences were carried into effect' (para [14]). Likewise, in *S v Katu* 2001 (1) SACR 528 (E), a reviewing judge set aside a sentence previously imposed and remitted the matter to the magistrate's court for a fresh imposition of sentence after it transpired that the juvenile offender was still being detained in prison pending his removal to a reform school fifteen months after he had been sentenced. Both these cases placed reliance on section 76(4)(e) and (d) of the Child Justice Act 75 of 2008 which aims to prevent 'a child languishing in a prison or other place of detention for longer than a month whilst awaiting transfer to a Child and Youth Care Centre' and are therefore distinguishable from the present matter where the accused had already been placed and was resident in the facility to which he had been sentenced before it was closed down (para [20]).

Judge Pickering of the Eastern Cape High Court, Grahamstown, therefore agreed that the imposition of an alternative sentence without the first sentence having been set aside on review or appeal, is confined to the specific circumstances and provisions set out in section 76(4)(d) and (e) of the Child Justice Act 75 of 2008, and that once a juvenile offender has been

placed and is resident in the Child and Youth Care Centre to which he or she was sentenced, the trial magistrate becomes *functus officio* as the court's jurisdiction has been fully and finally exercised (paras [21] [22]). The only basis on which the sentence of the present accused could, therefore, be amended was by way of review or appeal (para [23]). The accused's sentence was consequently set aside and the matter remitted to the regional magistrate for sentencing afresh (para [26]).

#### ORDERING THAT A SUSPENDED SENTENCE NOT RUN CONCURRENTLY WITH ANY OTHER SENTENCE IMPOSED

The accused in *S v Maseti* 2014 (2) SACR 621 (ECG) was convicted of assault with intent to cause grievous bodily harm and sentenced to eighteen months' imprisonment wholly suspended for five years on condition that the accused is not convicted of the same offence, murder, or culpable homicide involving violence during the period of suspension. The sentencing magistrate also ordered that the suspended sentence was not to run concurrently with any other sentence imposed (para [1]).

Ordering that a suspended sentence not run concurrently with any other sentence subsequently imposed is not permitted in terms of section 297 of the Criminal Procedure Act (para [4]). It is the prerogative of the court which proves the existence of the previous conviction, to consider whether or not the suspended sentence should be brought into operation and if so, on what conditions (para [5]). The sentence in this present matter was consequently amended by striking out the last sentence (para [7]).

#### SUMMARY CONVICTION AND SENTENCE IN TERMS OF SECTION 108 OF THE MAGISTRATES' COURT ACT 32 OF 1944

Section 108(1) of the Magistrates' Court Act 32 of 1944 provides a summary procedure for contempt of court where any person wilfully insults a judicial officer or another official of the court, or wilfully interrupts proceedings, or otherwise misbehaves. Once convicted, such an offender can be sentenced to a fine of R2 000 or in default of payment, to imprisonment for a period not exceeding six months. It is also possible for an offender to be sentenced to imprisonment without the option of a fine. Section 108(2) of the Act furthermore provides that where section 108(1) had been invoked,

the judicial officer shall transmit the matter to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.

In *S v Motaung* (29/2014) [2014] ZAFSHC 108 (7 August 2014), the accused was sentenced to six months' direct imprisonment under section 108(1) of the Magistrates' Court Act, for wilfully interrupting the proceedings of the court and wilfully interfering with the proper functioning of the court (para [8]). This was confirmed on review and the disruptive behaviour of the accused was found to be clear and evident from the court record (para [12]). However, with regard to the procedure set out in section 108(2) of the Act, the magistrate failed to set out the grounds and reasons for the summary conviction and sentence in a statement he certifies to be true and correct, and also did not provide a copy of such a statement to the offender (para [4]). Instead, the magistrate wrote a letter that bore his official stamp and signature and detailed the events that had led to the summary conviction and sentence in terms of section 108 of the Magistrates' Court Act 32 of 1944 (para [4]).

In considering the rationale in *S v Nxane* 1975 (4) SA 433 (O), where it was held that the provisions of section 108(2) are merely administrative in nature and do not constitute an indispensable part of the section 108(1) proceedings, Judges Daffue and Murray of the Free State High Court, Bloemfontein, found that the failure of the magistrate in the present case to provide a certificate as per section 108(2), did not constitute an irregularity that would invalidate the section 108(1) proceedings (para [6]). With regard to the failure of the magistrate to provide the offender with a copy of the letter, the reasoning in *S v Mitchell* 2011 (2) SACR 182 (ECP) was considered. In *Mitchell*, the reasons for providing an offender with a copy of the section 108(2) certificate was stated as twofold: To enable the offender to confirm the facts stated therein, and to give the offender the opportunity to express his or her remorse (para [15]). Yet, while it was clear from the court record that the magistrate did not provide the accused with a copy of his letter, Daffue and Murray JJ held that such a failure also does not necessarily invalidate the section 108(1) conviction, but can impact on the accused's rights. In this case, however, the judges were satisfied that the accused's rights had been adequately observed and protected as the magistrate had

explained to the accused that his conduct amounted to contempt and also explained the section 108 procedure of the Magistrates' Court Act.

## PAROLE

### *Determinate and indeterminate sentences and the right to be considered for placement on parole*

The appellant in *Nyawuza v S* (AR 262/13) [2014] ZAKZPHC 47 (16 September 2014) was convicted of murder and robbery with aggravating circumstances and sentenced to an effective term of 35 years' imprisonment (para [1]). At the time these sentences were imposed, the appellant was already serving an effective fifteen-year term for murder and attempted robbery (para [2]). The appellant subsequently applied for leave to appeal against his sentence arguing that the court had misdirected itself in not taking into consideration the fact that he was already obliged to serve a term of fifteen years, and once he had completed this term would have to start serving the term of 35 years' imprisonment (para [4]). This cumulative term of 50 years' imprisonment, the appellant argued, was so severe that it induced a sense of shock and warranted interference by an appeal court, especially given the fact that he would have qualified for release on parole after having served thirteen years and three months of his indeterminate term of life imprisonment (paras [4]–[6]).

Judge Koen for the High Court, KwaZulu-Natal Division, Pietermaritzburg, first pointed out that parole provisions and when an accused might be eligible to be considered for release on parole are not a concern of a sentencing court (para [7]). Moreover, in referring to the judgment in *S v Mafoho* 2013 (2) SACR 179 (SCA), it was held that while section 73(6)(a) of the Correctional Services Act 111 of 1998 provides that no prisoner shall be considered for placement on parole unless he or she has served half of his or her term of imprisonment and no more than twenty-five years before being considered for parole, this did not render every appeal dealing with sentences in excess of 50 years' imprisonment academic (paras [8] [9]).\* At issue on appeal remained 'whether

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\* Note that section 9(d)(iv) of the Parole and Correctional Supervision Amendment Act 87 of 1997 provides that for imprisonment contemplated in section 52(2) of the Criminal Law Amendment Act 105 of 1997 a prisoner will have to serve at least four-fifths of the term of imprisonment imposed or 25 years, whichever is the shorter.



the sentences imposed were appropriate, regard being had to the relevant legal principles' (para [9]).

On the question as to what an appropriate period of incarceration would be, the following can be gleaned from case law:

- A sentence of 25 years' imprisonment is generally regarded as a very long term and should be imposed only in exceptional circumstances (*S v Whitehead* 1970 (4) SA 424 A 438F–440).
- A sentence of 30 years' imprisonment is an extremely severe sentence (*Mabunda v S* 2013 (2) SACR 161 (SCA) para [7]).
- In *Basson v S* [2012] ZASCA 204 (para [14]), it was held that the cumulative effect of two sentences passed by different courts — 40 and 36 years respectively — was too severe and parts of both sentences were ordered to run concurrently for an effective term of 25 years to be served (para [17] of *Nyawuza* case). With regard to a court's discretion to order that sentences run concurrently, it was also noted that it 'is an important and essential tool to introduce an element of mercy and to ameliorate the unduly lengthy cumulative effect of imprisonment' (para [18] of the *Nyawuza* case).

While it is trite that sentences imposed on charges arising from the same facts and usually dealt with in the same trial can be ordered to run concurrently, the overall length of incarceration resulting from sentences imposed on separate occasions and arising from separate instances, should also be considered to avoid unduly lengthy and cruel sentences. To ameliorate the cumulative effect of such sentences it can, therefore, also be ordered that sentences run concurrently in whole or in part (paras [19]–[21]). In this case, parts of the sentences imposed were ordered to run concurrently to make for an effective term of 25 years' imprisonment (para [26]).

*Section 276B(1)(b) of the Criminal Procedure Act 51 of 1977 and the fixing of a non-parole period*

The appellant in *Mogaga v S* (A622/2013) [2014] ZAGPPHC 199 (26 March 2014) was convicted of murder, housebreaking with the intent to rob and robbery with aggravating circumstances, unlawful possession of a firearm, and unlawful possession of ammunition. The trial court sentenced the appellant to life imprisonment plus a further 27 years' imprisonment and further ordered that the Department of Correctional Services should only

release the appellant on parole after he had served at least 30 years of his sentence (para [2]).

With regard to the imposition of a term of life imprisonment plus a further determinate term of incarceration, it was held that both section 32(2) of the previous Correctional Services Act 58 of 1958, as well as section 39(2)(a)(i) of the current Correctional Services Act 111 of 1998 provide that any determinate sentence of incarceration be served concurrently with a life sentence or another indeterminate sentence of incarceration (paras [6]–[14]; also see *S v Mashava* 2014 (1) SACR 541 (SCA)).

With regard to the non-parole period fixed in this sentence, Judge Phatudi for the North Gauteng High Court, Pretoria, held that in terms of section 276B(1)(b), such a fixed non-parole period may not exceed two-thirds of the imprisonment term or 25 years, whichever is the shorter, and that the fixing of a non-parole period should only be made in exceptional circumstances (paras [17]–[22]). He also held that the facts prompting such a decision to fix a non-parole period should be relevant to parole and not only be aggravating factors relating to the crime committed. In such a case the accused must also be afforded an opportunity to address the court on the issue ‘as to whether exceptional circumstances exist which imperatively call for such an order to be made and, if needs to be invoked, what an appropriate non-parole period would be to order in the circumstances’ (para [22]).

Also see *Steyn v S* (A278/13) [2014] ZAGPJHC 268 (16 October 2014) and *Zono v S* (20182/2014) [2014] ZASCA 188 (27 November 2014).

### *Restorative justice as a requirement for release on parole*

The Parole Board ordered that the applicant in *Gwebu v Minister of Correctional Services & others* 2014 (1) SACR 191 (GNP) not be released on parole until he had made peace with the family of the victim, who in this case resided outside the borders of the Republic of South Africa (para [5]). Judge Ebersohn for the North Gauteng High Court, Pretoria, described this parole requirement as follows ‘This so-called “restorative justice” concept is a fabrication of a process . . . The whole process is an illegal concoction undermining the rights of prisoners to be released on parole when they legally qualify for it’ (para [5]).

An order was accordingly made for the Parole Board to place the applicant on parole within 30 calendar days of the order being made (para [9]).

### A COMPETENT SENTENCE ON A GUILTY PLEA IN TERMS OF SECTION 112(1)(a) OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Section 112(1)(a) of the Criminal Procedure Act provides for an accused to plead guilty to the offence charged at a summary trial, and to be convicted of that crime. This, however, is only possible in terms of this provision if the presiding judicial officer is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine, or a fine exceeding the amount as specified by the Minister from time to time in the *Government Gazette*. Once convicted, the presiding officer may impose a competent sentence with due regard to the restrictions as set out in the provision.

In *S v Govender* (DR 242/2014) [2014] ZAKZPHC 54 (4 November 2014), the prosecutor accepted the accused's guilty plea in terms of section 112(1)(a) of the Criminal Procedure Act in that she had contravened section 58(1)(b) of the Marine Living Resources Act 18 of 1998 read together with regulations 22(1)(d) and 27(1)(a) by being in unlawful possession of 67 shad which she had sold without having the prescribed permit (para [2]). The accused was subsequently sentenced to six months' correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, with certain specified conditions including house arrest. However, the magistrate immediately realised that this was not a competent sentence given the restrictions of section 112(1)(a) of the Act and referred the matter on special review in terms of section 304(4) (paras [1] [3]).

Judge Ndlovu for the KwaZulu-Natal Division, Pietermaritzburg, agreed that house arrest 'is clearly and logically a form of detention without the option of a fine as envisaged in section 112(1)(a) of the Criminal Procedure Act 51 of 1977' and cannot therefore be competently imposed following a conviction under section 112(1)(a) (para [6]). However, in referring to *S v Cedars* 2010 (1) SACR 75 (GNP), *R v Harmer* 1906 TS 50, and *S v Zulu* 1967 (4) SA 499 (T), Ndlovu J held that section 304(4) proceedings need not be strict in accordance with law, but rather need to be in accordance with justice. The circumstances of cases such as the present do not always demand that the sentence imposed be set aside due to a technical irregularity (paras [7] [8]). In considering the facts of the present case the sentence was not found to be in accordance with justice and the matter was remitted to the magistrate to consider sentence afresh (para [13]).

DECLARING AN OFFENDER AN HABITUAL CRIMINAL IN TERMS OF  
SECTION 286 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

The appellant in *Trichart v S* 2014 (2) SACR 245 GJ pleaded guilty and was convicted on a charge of theft having stolen 900g of cheese to the value of R66,99. Before imposing sentence the court adjourned to allow the prosecution to obtain the SAP 69 which lists all the previous convictions — if any — of the offender. The appellant's SAP 69 showed a total of thirteen previous convictions dating back to 1988 and including various counts of theft, housebreaking, and one count of robbery (paras [1] [2]). The magistrate, in dismissing a probation officer's report recommending that the appellant be sent for drug rehabilitation, emphasised the long list of previous convictions and declared the appellant to be an habitual criminal in terms of section 286 of the Criminal Procedure Act (paras [5]–[15]).

On appeal Judge Vally for the North Gauteng High Court, Johannesburg, first emphasised the important role that probation officers play as officers of the court in the South African criminal justice system.

The probation officers . . . perform a valuable task, one that is of huge assistance to judicial officers. The roles performed by the two enjoy a symbiotic relationship. The judicial officer considers factors such as the interests of the convicted individual, the nature and gravity of the crime(s) for which he or she has been convicted and the interests of society. In considering the interests of the individual the judicial officer receives invaluable information gathered by the probation officer and has the benefit of the probation officer's expertise regarding the psycho-social and other conditions and circumstances concerning the offender (para [10]; also see *Fielies v S* (851/2013) [2014] ZASCA 191 (28 November 2014)).

With regard to declaring the appellant an habitual criminal in terms of section 286(1), Vally J highlighted the far-reaching implications of such a declaration, particularly when an offender had already been punished for his or her previous offences. A declaration in terms of section 286(1) must, therefore, only be made after careful consideration of all the facts to ensure that all the offences had indeed been committed out of habit, and that the crimes were of such a nature that society required protection from the offender for at least a period of seven years (para [20]). Even if this was found to be the case, all other considerations, including the nature of the offence, the interests of the offender,

and the interest of society, must still be taken into account in determining whether such a declaration is indeed appropriate (para [20]).

In the present matter it was found that the declaration of the appellant as an habitual offender was an unduly harsh punishment for a minor misdemeanor and that the magistrate had not taken into account the central role that the appellant's drug dependence played in his criminal behaviour (paras [20] [22]).

#### TIME SPENT IN CUSTODY AWAITING TRIAL AS A SUBSTANTIAL AND COMPELLING CIRCUMSTANCE WARRANTING A DEVIATION FROM A PRESCRIBED MINIMUM SENTENCE

The three respondents in *Director of Public Prosecutions North Gauteng: Pretoria v Gcwala & others* 2014 (2) SACR 337 (SCA) were convicted of murder and each sentenced to an effective term of twelve years' imprisonment. The state appealed against this sentence arguing, *inter alia*, that the trial court had erred in regarding the time that the three respondents had spent in custody awaiting trial — a total of four years — as a substantial and compelling circumstance warranting a deviation from the prescribed minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997 (paras [1]–[8]).

The trial judge explained that he had taken the four years spent in custody and doubled that number so that he deducted eight years from each of the respondents' sentences he would otherwise have imposed (para [10]). This is similar to what was suggested in *S v Brophy & another* 2007 (2) SACR 56 (W), where it was held that 'as a rule of thumb, imprisonment while awaiting trial is the equivalent of a sentence of twice that length' (para [10]; also see *S v Stephen & another* 1994 (2) SACR 163 (W)). This 'mechanical' approach was rejected, however, in *S v Vilikazi & others* 2000 (1) SACR 140 (W), *S v Dlamini* 2012 (2) SACR 1 (SCA), and *S v Radebe & another* 2013 (2) SACR 165 (SCA).

Judge Lewis, writing for the majority of the Supreme Court of Appeal, also rejected this mechanical approach and emphasised that the period spent in custody awaiting trial is just one of many factors that should be taken into account in deciding upon a just and appropriate sentence (para [16]).

#### SUBSTANTIAL AND COMPELLING CIRCUMSTANCES FOR A SENTENCE OF LIFE IMPRISONMENT ON A CONVICTION OF RAPE

The appellant in *S v FV* 2014 (1) SACR 42 (GNP) appealed against his sentence of life imprisonment for raping his daughter.

The sentencing court found that no substantial and compelling circumstances existed warranting a lesser sentence, but the appellant argued that the following factors should have carried greater weight: that he was 41 years old; a first offender; was himself sexually abused as a child; that his wife was sexually distant as she had been raped before; that the appellant was not a threat to society; that his family was financially dependent on him; and that the complainant still loved him as her father (para [12]).

These factors, according to Judge Janse van Nieuwenhuizen for the North Gauteng High Court, Pretoria, were not substantial and compelling circumstances warranting a lesser sentence. The fact that the complainant still loved her father was rather regarded as an aggravating factor as it is 'indeed very sad that the father [whom the child still loves] . . . deprived [the complainant] of the privilege to lead a normal and fulfilled life' (para [17]). The fact that the appellant failed dismally in his responsibilities as a father was further emphasised by the fact that he had now, through his conduct, left his family destitute (para [18]).

The appellant also did not show any remorse for his actions (para [19]). Remorse, it was held, requires some insight into the seriousness of the offence committed and should also be borne out by the appellant's subsequent conduct. This was unfortunately not the case here, as the appellant continued to shift the blame to the complainant and was himself unsure about his actions and how he could have raped his own daughter (paras [21] [22]). The appeal was dismissed.

In *S v AM* 2014 (1) SACR 48 (FB), the appellant was also sentenced to life imprisonment for raping his partner's daughter. In this case it was argued that sufficient consideration had not been given to the fact that the appellant was a first offender, was 40 years of age, and that the rape was not 'the worst kind' as the complainant had not been seriously injured. Mocumie and Sepato JJ for the Free State High Court, Bloemfontein, also rejected these submissions as justifying a lesser sentence (para [17]).

Similarly, in *S v MS* 2014 (1) SACR 59 (GNP), an appeal by the appellant against a sentence of six terms of life imprisonment handed down against conviction on six counts of raping his (11-year-old) stepdaughter, also failed. In this case, the fact that the appellant was 44 years old and did not have much schooling did not count as mitigating factors, as it was found that he

showed no remorse and the complainant had been severely traumatised by the rapes (para [28]). It was further held that the brutal and repetitive rape of the complainant over six consecutive nights and her daytime flight from the appellant after which she had lost consciousness, constituted the worst possible kind of rape and therefore warranted the sentence imposed (para [31]).

However, in *S v SM* 2014 (1) SACR 53 (GNP), the appellant's sentence of life imprisonment was set aside and replaced with a sentence of fifteen years' imprisonment for raping his fifteen-year-old daughter. Factors taken into consideration were that the appellant was a first offender, he had pleaded guilty, had spent seven months in custody awaiting trial, and that the complainant had not been kidnapped. The appellant's prospects of rehabilitation were also considered (para [3]). With reference to recent case law — *S v MM*; *S v JS*; *S v JV* 2011 (1) SACR 510 (GNP), *S v EN* 2014 (1) SACR 198 (SCA), and *S v SMM* 2013 (2) SACR 292 (SCA) — where it was reaffirmed that 'life imprisonment is the ultimate and most severe sentence which a court can impose', the court found that a lengthy prison sentence would 'properly and proportionally take into account the seriousness of the appellant's crime, the interest of the appellant and the needs of society' (para [14]).

Also see *MDT v S* (2014 (2) SACR 630 (SCA).

#### FAILURE TO FOREWARN AN ACCUSED OF THE APPLICABILITY OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Where an indictment makes no mention of the applicability of the Criminal Law Amendment Act 105 of 1997 and the possibility of an accused being sentenced to a prescribed minimum sentence, and the trial judge also did not warn the accused of its applicability, such failure constitutes a fatal irregularity resulting in an unfair trial in respect of the sentence (*Machongo v S* (20344/14) [2014] ZASCA 179 (21 November 2014) para [10]). In such a case the appeal court must consider the sentence afresh and 'considering a sentence afresh must ineluctably mean setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of sentence. . .' (para [11]).

SECTION 35(3) OF THE NATIONAL ROAD TRAFFIC ACT 93 OF 1996  
AND THE AUTOMATIC SUSPENSION OF A DRIVER'S LICENCE

The appellant in *S v Greef* 2014 (1) SACR 74 (WCC) was convicted of having driven a motor vehicle on a public road whilst his blood alcohol concentration level exceeded the permissible level as per section 65(2)(a) of the National Road Traffic Act 93 of 1996. The trial magistrate subsequently sentenced him to a fine of R3 000 or six months' imprisonment, a further fine or six months' imprisonment suspended for five years on appropriate conditions, and also suspended the appellant's driving licence for a period of six months in terms of section 35(1)(c)(i) of the National Road Traffic Act 93 of 1996 (para [3]).

In an appeal against the suspension of his driving licence, it was firstly emphasised that the noting of an appeal does not suspend the sentence imposed and '[s]trictly speaking, the suspension of a driving licence in terms of section 35(1) occurs ex lege unless a contrary order is made in terms of section 35(3) and the suspension is thus not pursuant to an order' (para [4]; also see *S v Wilson* 2001 (1) SACR 253 (T)). It was also evident from the amendments made to section 35(3) by the legislator by way of Act 64 of 2008 that a non-suspension order can only be made once evidence under oath has been presented by the prosecution and the defence. The lawmaker was, therefore, 'no longer content for non-suspension to be ordered on grounds which had not been properly established and tested under cross-examination' (para [7]). And finally, it was emphasised that while previously there was no limit on the circumstances to which a court could have regard in determining whether a non-suspension order was justified, those circumstances have now been limited by the legislator to circumstances relating exclusively to the offence committed (para [8]). The fact that an offender's driving licence is important for his or her work or family life is, therefore, no longer a valid consideration in determining whether or not a non-suspension order should be granted (paras [8] [9]).

In this instance, however, circumstances related to the offence justified an order in terms of section 35(3). The circumstances that the appeal court took into consideration in this regard included the following (para [12]):

- The appellant in this case had had nothing to drink for some five to six hours before driving.
- The appellant did not feel drunk and did not know that the alcohol was still in his blood when he got into the car to drive.



- No expert evidence was led as to whether a person of the appellant's build and metabolism was likely to suffer any significant effects from the level of alcohol in his blood.
- The appellant was to drive the vehicle for a very short distance in a country town.
- The appellant was involved in a minor collision at a stop street while he was driving the car and it was not due to negligence or reckless driving on his part.

It must be noted that the automatic suspension of a driving licence in terms of section 35(1) of the National Road Traffic Act 93 of 1996 must be distinguished from the discretionary powers that a court has in terms of section 34(1) of the Act to order the suspension of an offender's driving licence for such a period as the court deems fit (para [10]).